IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting
(Chapter VIII, Rule 32 (2) (b)

Description of Case

CRIMINAL APPEAL NO. 1347 of 2001
(Old No. 1025 of 1988)

Date of decision:- 17.10.2006

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-17.10.2006

Initials of Judge

Note:- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

CRIMINAL APPEAL NO. 1347 of 2001
(Old No. 1025 of 1988)

1. Gopal Singh S/o Hira Singh
   R/o village Dogada
   (Bhujiya Ghat) P.O. Dogada, Nainital
2. Virendra Singh S/o Khadog Singh
   Village Dagada
   (Bhujiya Ghat) P.O. Dogada, Nainital…….Appellants

Versus

State of Uttaranchal ……Respondent

Date:- 17th October, 2006

Mr. P.M.N. Singh learned Senior Advocate assisted by Ms. Prabha Nauliyal learned counsel for the appellants.
Mr. H.C. Pandey learned AGA for the State.

Coram: Hon'ble M.M. Ghildiyal, J.
Hon'ble J.C.S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1) This is a criminal appeal against the judgment and order dated 28.04.1988 passed by Shri Bir Bhadra Singh, the then III Additional Sessions Judge, Nainital in S.T. No.179/1987 State Vs. Gopal Singh & others, whereby the appellant-Gopal Singh was convicted under section 364, 302/34 IPC read with 120-B IPC. The appellant-Virendra Singh was convicted under section 302/34 IPC & 120-B IPC. Both the appellant were sentenced to undergo RI for life imprisonment. Both the sentences of appellants would run concurrently. However, by the said judgment and order the other accused person-Govind Singh was found not guilty and he was acquitted.

2) Brief facts of the prosecution case are that on 18.04.1987 the complainant-Dharam Singh PW1 lodged a written report to the Patti Patwari Chopra alleging therein that on 16.04.1987 at about 8pm the appellant-

Gopal Singh came to his house and took his son-Puran Singh with him. Thereafter, his son Puran Singh (deceased) did not return home. On 18.04.1987 the complainant-Dharam Singh PW1 came to know that one dead body of young lad was lying in the canal at Bhujiaghat Gadhera. He reached at Bhujiaghat and found his son dead. He reported the matter to the police. The investigation was taken up as usual which culminated into the submission of the chargesheet. After submission of chargesheet the accused persons were committed to the court of Sessions for trial and the trial court framed charges against the accused persons. The accused person denied the charges levelled against them and claimed the trial.

3) The prosecution in order to support its case examined as many as eight witnesses. Dharam Singh PW1 was the scribe of the report. He was the father of the deceased. The prosecution has adduced the evidence of Radha Devi PW2 and Smt. Ganga PW3, mother of the deceased. Laxman Singh PW4 had stated that 2-3 days before the incident he saw the deceased alive in the company of appellant-Gopal Singh. The prosecution has also examined the evidence of Lal Singh PW5, Ramesh Singh PW6 and Himmat Singh PW7. Ramesh Chandra Badhani PW8 (Patwari) was the Investigating Officer, who submitted the chargesheet against the accused persons.

4) In the statement recorded u/s 313 Cr.P.C. the accused persons denied the prosecution case and stated that they have been falsely implicated in this case.

5) The learned trial court after appraisal of the evidence on record convicted and sentenced the appellants as mentioned above. However, co-accused Govind Singh was acquitted from the charges levelled against him.

6) We have heard the learned counsel for the parties and perused the evidence on record.

7) At the outset, it needs to be mentioned here that it is not disputed that the deceased met a homicidal death on account injuries sustained by him on the date of occurrence. The post mortem report of the deceased shows that the death of the deceased was caused due to shock and hemorrhage as a result of ante-mortem injuries sustained by him. The following ante-mortem injuries were found on the person of deceased.

(i) Lacerated wound present in midline scalp near the hair line of forehead placed outer posteriorly size 4cm x 1cm x skin deep.

(ii) Lacerated wound present over the left side scalp 5 cm behind left ear size 7cm x 2cm x bone deep. Depressed fracture of bone underneath visible.

8) The prosecution has adduced the evidence of Dharam Singh PW1, who was the father of the deceased. Dharam Singh PW1 had stated in his evidence that he received information that a dead body of young lad was lying in a canal at Bhujiaghat Gadhera. He immediately proceeded towards the canal where the dead body of a young lad was lying. When he reached there he recognized the dead body of his

Son. Thus, it is amply established that the deceased Puran Singh met a homicidal death on account of injuries sustained by him.

9) Now, we have to consider whether the appellants were responsible for the injuries sustained by the deceased. There was no eye witness of the occurrence. At the outset, it needs to be mentioned here that the prosecution case rests upon the circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it would be such as to point out only to the guilt of the accused and the evidence should exclude all other hypothesis except the guilty of the accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no interference other than the guilt can be drawn.

10) The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence, has held that onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be

based on circumstantial evidence were enumerated as under:-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision was also relied on and affirmed in the latest decision of the Hon'ble Apex

Court in **State of Rajasthan Vs. Rajaram 2003 Cri.L.J. p/3901.**

11) Keeping in view the above principle of law, we shall consider the circumstances projected by the prosecution against the appellants. The first circumstance relied upon the prosecution is that the appellant-Gopal Singh came to the house of the deceased on 16.04.1987 at about 5pm and he took the deceased with him. Thereafter, the deceased did not return home and on 18.04.1987 the dead body of the deceased was found. The prosecution in support of its case adduced the evidence of Dharam Singh PW1-father of the deceased. Dharam Singh PW1 had stated in his evidence that Gopal Singh-appellant came to his house on 16.04.1987 at about 5pm and he took his son Puran Singh alongwith him. Puran Singh was taken to the shop and thereafter Puran Singh came back to home. Dharam Singh PW1 further stated in his evidence that the appellant-Gopal Singh again came to his house at about 8pm on the same day and took his son-Puran Singh and they went together from the house. He further stated that his son Puran Singh did not return home. He received an information that a dead body of young lad was lying in a canal at Bhujiaghat Gadhera. He immediately proceeded towards the canal where the said dead body was lying. When he reached there he acknowledge the dead body of his son. Thereafter, he immediately reported the matter to the police. During the cross examination, he had stated that he had no enmity with the appellant-Gopal Singh and he had further stated that the appellant-Gopal Singh used to come to his house. He further stated in his cross examination that when

his son was taken by the appellant-Gopal Singh he was not present in his house. His son-Lalit told him that the appellant-Gopal Singh had taken the deceased-Puran Singh. He had further stated that his wife was also not present at that time. His wife was cutting the crops in the field. Dharam Singh PW1 had himself gone to cut the grass from the field from where he also brought water from the water channel. He further a stated in his cross examination that he went to the house of the appellant-Gopal Singh to search his son. He further stated that the appellant-Gopal Singh also came to see the dead body of his son. Smt. Ganga PW3-mother of the deceased had stated in her evidence that the appellant-Gopal Singh came to her house on 16.04.1987 at about 5 to 6pm and he took her son Puran Singh with him. Thereafter, the deceased-Puran Singh did not return home. She had further stated that the appellant Gopal Singh came to her house on the next day after the incident. When she asked him whereabouts of Puran Singh he gave an evasive reply. She further stated that the dead body of the deceased was recovered on 18.04.1987. She had stated in her cross examination that her statement under section 161 Cr.P.C. was not recorded. She had admitted in his cross examination that there was no enmity in between the deceased and the appellant-Gopal Singh. The prosecution also adduced the evidence of Smt. Radha Devi PW2, who had stated that she was working with Puran Singh on 16.04.1987 at about 5pm. Thereafter, the appellant-Gopal Singh and the deceased Puran Singh came to her house and they took a torch from her house and left her house. Radha Devi PW2 had admitted that the appellant-Gopal Singh had a fractured hand and there was a plaster in his hand.

She had further stated that the I.O. had recorded her statement after one month from the date of incident. The prosecution has also adduced the evidence of Laxman Singh PW4, who had stated that the appellant-Gopal Singh and the deceased came to his shop to purchase the cigarette and match box on 16.04.1987 and thereafter he had not seen the deceased in the village and on 18.04.1987 the dead body of the deceased was recovered from the canal at Bhujiaghat Gadhera. He was the witness of Panchayatnama of the dead body of the deceased. He had further stated in his evidence that a report was lodged against the deceased in the police chowki Jyolikot that he had stolen the ginger from the village. Laxman Singh PW4 had also admitted in his cross examination that he was not able to tell how many persons came to his shop on that day when the deceased and the appellant-Gopal Singh came to his shop. The prosecution had adduced the evidence of Lal Singh PW5, who had stated that when he was just ready to take dinner in his house he heard some noise outside his house. She saw through the window and found the deceased and the appellant-Gopal Singh going towards the house of Gopal Singh. Thereafter, he took his meals. When he was washing his hands he again heard the noise from the side of his neighbour Himmat Singh PW7. Himmat Singh PW7 was not present in his own house. When he entered into the house of Himmat Singh it was revealed that some persons had pelted stones upon the house of Himmat Singh PW7. Lal Singh PW5 had further stated that the ladies present in the house told him that some persons ran from there and they were chased by the dogs. Ramesh Singh PW6 had not suppoted the prosecution version. Himmat Singh PW7 was also produced by the

prosecution. Himmat Singh PW7 had corroborated the statement of Lal Singh PW5. The statement of Himmat Singh PW7 was recorded by the police after ten to fifteen days of the incident. Ramesh Chandra Badhani PW8 was the Investigating Officer of this case. The prosecution has adduced the evidence that the deceased was lastly seen alive in the company of the appellant-Gopal Singh on 16.04.1987 and thereafter the dead body of the deceased was recovered on 18.04.1987.

12) The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. There may be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the

accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such close proximity of time and place. From the evidence as stated above such inference cannot be drawn. The prosecution has led the evidence that the appellant-Gopal Singh and the deceased went together on 16.04.1987 whereas the dead body of the deceased was recovered on 18.04.1987. There is a long gap between the two. In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof.

13) The prosecution has taken a consistent case that the deceased was lastly seen alive in the company of the appellant-Gopal Singh at about 8pm on 16.04.1987 and therefter they went together from the house of the deceased. Dharam Singh PW1 had stated that Gopal Singh came at about 5pm and after some time

the deceased came back to home. At about 8pm the appellant-Gopal Singh again came to his house and took his son. Thereafter, his son did not return home. Whereas Smt. Ganga PW3-mother of the deceased had not stated that the appellant came twice to her house on the date of incident. Smt. Ganga PW3 had only stated that the appellant-Gopal Singh took her son from the house at about 5pm. She had not stated in her statement anywhere that the deceased-Puran Singh returned to his house. There is a variation between the statement of Dharam Singh PW1 and Smt. Ganga PW3. According to the FIR the deceased was taken at 8pm by the appellant-Gopal Singh and as such the evidence of Radha Devi PW2 is not of much importance that she had seen the appellant and the deceased prior to 8pm. Thus, the evidence of the prosecution is self-contradictory and cannot be relied upon. Sometimes it is in the evidence that Dharam Singh PW1 and Smt. Ganga PW3 (father and mother of the deceased respectively) were not present at the time when the deceased was taken by appellant-Gopal Singh.

14) Thus, the evidence of last seen is self-contradictory. It is also in the evidence that the deceased was involved in the theft of wood and ginger. It reveals that he had the bad antecedents in the village. Thus, the evidence of the prosecution did not constitute a circumstance which draws an incriminating inference against the accused and connect with the appellant-Gopal Singh.

15) The second incriminating circumstance which has been stated by Smt. Ganga PW3 that the appellant-

Gopal Singh came to her house on the very next day and he gave an evasive reply about the deceased. It is pertinent to mention here that if the appellant-Gopal Singh had committed the murder of the deceased he would not have visited the house of the deceased on the very next day. It is also pertinent to mention here that it has come in the evidence that the appellant-Gopal Singh also came to see the dead body of the deceased when it was recovered. If he had committed the murder it would be his natural conduct to abscond from there and not to go to see the dead body of the deceased. Thus, this fact also reveals that the appellant-Gopal Singh was not guilty of any offence. Ganga Devi PW2 the mother of the deceased had stated that there was no enmity between the deceased and the appellant Gopal Singh. Thus, they had a good relation. There was no occasion for the appellant to commit the murder of the deceased. Thus, this circumstance is not an incriminating circumstance at all, for friends would go together or smoke together or dine together which is a common feature. Apart this, the appellant was present all the time in the village or with the deceased family and all this only indicates his innocence in the matter. The above facts and circumstances are not consistent with the hypothesis of his guilt.

16) Learned counsel for the appellants contended that there was delay in lodging the FIR. The FIR is very important document and the prompt FIR gives the confidence that it is a correct version and the facts which have been mentioned therein are correct. If the FIR has been lodged by undue delay, it should have

been properly explained at the time of lodging the FIR. The delay in lodging the FIR shows that it was the outcome of due consultation or deliberation. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. In the case in hand, the deceased went with the appellant-Gopal Singh on 16.04.1987 and thereafter he did not return home. The FIR was lodged on 18.04.1987 at about 11:30pm whereas the missing report should have been lodged earlier. The explanation for delay was submitted that there was some dispute with regard to the jurisdiction where the crime was committed. Dharam Singh PW1 had stated in his evidence that he went to the Patwari checkpost where it was stated that the matter relates to Kathgodam police station and it should be lodged in the Kathgodam police station. He immediately went to Kathgodam police station from where he was returned on the excuse that the place of incident falls within the jurisdiction of the revenue police. Thereafter he came to Patwari and lodged the report to the Patwari. Ramesh Chandra Badhani PW8-Patwari had stated in his cross examination that he came at about 11:30pm in the night and thereafter the report was lodged. He

had further stated that Dharam Singh PW1 never came before 11:30pm to the check post. Thus, the explanation submitted by Dharam Singh PW1 is not satisfactory and plausible. There is a delay in lodging the FIR. Apart this, when his son was taken on 16.04.1987 no missing report was lodged either to the police station or to the revenue police. These facts lead to take an inference that the FIR was also lodged with undue delay which is fatal to the prosecution. It is pertinent to mention here that the statement of Lal Singh PW5 recorded after ten to fifteen days of the incident. The statements were recorded by inordinate delay. Thus, the theory advanced by the prosecution does not inspire confidence.

17) The trial court has held that the appellant-Gopal Singh had a fractured hand and it was not possible for him to cause injuries on the person of the deceased. The trial court has observed that the post mortem reports shows that the injuries sustained by the deceased would have been caused with the assistance of one or more persons and it was not possible for the appellant-Gopal Singh himself to inflict such injuries. The trial court has relied upon the statement of Laxman Singh PW4 that the deceased Puran Singh had stolen the wood of Virendra Singh-appellant. The trial court has further held that these circumstances lead to take an inference that Virendra Singh-appellant had assisted Gopal Singh in committing the murder of the deceased. The finding of the trial court is based on surmises and conjectures. The trial court should have relied upon the legal evidence produced before the court below and he should not have convicted the appellants on the

basis of surmises and presumptions. The trial court had convicted the appellants without considering the legal evidence produced before the court below. It is well settled position of law that the prosecution should prove the case beyond reasonable doubt and if there is no legal evidence on record the accused cannot be convicted. No prosecution witness had stated the participation of appellant Virendra Singh. There is no direct or circumstantial evidence against the appellants on record. We are surprised as to how the trial court has convicted the appellant-Virendra Singh without an iota of evidence on record. Thus, the findings recorded with regard to appellant-Virendra Singh are perverse and against the record.

18) In order to base conviction or circumstantial evidence each and every piece of incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form such chain of events as would permit to conclusion other than the one of guilt of the accused and circumstances can not be explained on any hypothesis other than the guilt of the accused. The court has to be cautious and avoid risk of allowing mere suspicion, howsoever strong, to take the place of proof. A mere moral conviction or a suspicion howsoever grave it may be, cannot take the place of proof.

19) We are satisfied that none of the circumstances found proved against the appellants, therefore, the question of holding the accused appellants guilty of murder of the deceased does nor arise.

20) In view of the above discussions, we are of the view that there was no evidence on record to establish the guilt against the appellants. There was no direct or circumstantial evidence to prove the guilt against the appellants. The learned trial court erred in holding that the prosecution had established the guilt against the appellants beyond reasonable doubt. Therefore, the appellants deserve to be acquitted of the charges levelled against them. Under these circumstances, the impugned judgment and order dated 28.04.1988 cannot be sustained.

21) The appeal is allowed. Conviction and sentence awarded to the appellants per judgment dated 28.04.1988 passed by III Additional Sessions Judge, Nainital are set-aside. The appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

(J.C.S. Rawat, J.) (M.M. Ghildiyal, J.)

Dated 17th October, 2006

LSR